FILED
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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

No. 503

October Term, 1953.

FAUSTINO HERRERA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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FAUSTINO HERRERA,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Faustino Herrera, petitioner herein, prays that a Writ of Certiorari be issued to review the judgment entered November 19, 1953, by the United States Court of Appeals for the Ninth Circuit.

Opinion Below.

The opinion of the Court of Appeals affirming the judgment of the District Court is reported at ..... F. 2d ....., and a copy of said opinion is attached hereto as Exhibit "A."

Jurisdiction to Review.

The jurisdiction of this Court is involved under the Judicial Code of 1948, Title 28, U. S. C., Section 1254.

The judgment and order sought to be reviewed was entered on November 19, 1953. The thirty-day period within which petitioner may seek certiorari runs from the date of the entry of judgment.

Questions Presented.

Whether the statute on which petitioner was indicated, tried and convicted to wit: Title 8, U. S. C., Section 114(a)(2) was and is unconstitutional and in conflict with the Fifth Amendment to the Constitution of the United States. More specifically, petitioner contends that the statute is void for two reasons: first, it is void for vagueness and, second, it constitutes a form of class legislation which is arbitrary and capricious.

Statement of the Case.

Petitioner, Faustino Herrera, was born in the Republic of Mexico and approximately twenty years ago entered the United States legally. On or about November 26, 1952, he and his wife gave an automobile ride to three persons who had entered the United States illegally within the three years immediately prior to November 26, 1952.

On or about December 17, 1952, petitioner and his wife were charged by Grand Jury indictment with four counts of violation of Title 8, U. S. C., Section 144(a)(2). Counsel was appointed for the defense and the matter proceeded to trial before a jury. Count 1 of the indictment was dismissed as to both defendants. Petitioner

herein was convicted as charged in Counts 2, 3 and 4 of the indictment. Counsel was reappointed for the purpose of taking an appeal from the judgment of conviction and such appeal was taken to the Court of Appeals, Ninth Circuit. On or about November 19, 1952, the Court of Appeals, Ninth Circuit, entered its judgment affirming that conviction.

Text of the Statute Involved.

The challenged statute as amended March 20, 1952, reads as follows:

> "Sec. 8(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> "(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;
>
> "(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by any means of transportation or otherwise, in furtherance of such violation of law;
>
> "(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or
>
> "(4) willfully or knowingly encourages or induces or attempts to encourage or induce, either directly or indirectly the entry into the United States of any

alien, including an alien seaman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act, or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

I.

The Statute Is Void for Vagueness.

An excellent discussion of the patent vagueness and uncertainty of this statute was given by the Honorable Oliver Carter, Judge of the United States District Court for the Northern District of California, in holding the statute herein to be unconstitutional.

> "Though the statute be construed in the sense which best harmonizes with the manifest intent and purpose of Congress, and the evils sought to be overcome be given special attention, and the meaning of the statute be sought from a consideration of it as a whole, the terms thereof must so clearly define what acts are forbidden that men of common intelligence can determine what actions are criminal and what are not. Otherwise the statute is so uncertain as to be unconstitutional. Connally v. General Construction Company, *supra.*

"Assuming, but not deciding, that the court could remedy the obvious errors in punctuation which are patent upon the face of the statute, so that the section would read as proposed by the government, the sense of paragraph (2) still could not be reduced to one certain meaning. The phrase, 'knowing that *he* is in the United States in violation of law, and knowing or having reasonable grounds to believe that *his* last entry into the United States occurred less than three years prior thereto' (emphasis added), is not clear as to which word is the antecedent of the words 'he' and 'his'. This portion of the statute is susceptible of two radically different interpretations, depending upon the determination of whether these words refer to 'any person' or 'any alien.' Such an interpretation would require as a necessary element of the crime, which paragraph (2) purports to define, that the transporter as well as the alien transported be unlawfully in the United States. The legislative history of the Amendment which added the words of paragraph (2) to the statute fails to indicate that Congress intended to so narrowly define the crime. However, there is nothing therein which clearly rules out the possibility that such an intention may have existed. This possibility of interpretation is further fortified by the language of paragraph (1), which reads:

> "'(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by *himself* or through another, to bring into or land in the United States, by any means of transportation or otherwise;' (emphasis added).

The words 'by himself' obviously refer to the transporter ('any person') and not to the person trans-

ported ('any alien'). The factual situation in this case aptly illustrates the inconscruous result which could occur as a result of the application of the statute as it is now written. The defendants fall into three groups, namely, those who are aliens and admittedly in this country in violation of law; those who are aliens and who claim to be lawfully in this country; and one, who claims to be a citizen of this country. It is therefore possible that the statute would make criminal the acts of the defendants unlawfully in this country and at the same time not apply to the other defendnts, even though all of them had performed the same acts with the same intention.

"The other phrase in paragraph (2) which presents doubts as to its meaning is 'in furtherance of such violation of law.' The problem is again one of reference. Which violation of law is meant—that of the transported ('any alien') or of the transporter ('any person')?

"These phrases present patent ambiguities. Ambiguities are not to be resolved so as to embrace offenses not clearly within the law."

United States v. DeCadena, 105 Fed. Supp. 202.

The law is well established that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. General Const. Co., 269 U. S. 385, 391.

Certainly this statute lacks even that colloquial definition of terms which our Supreme Court found insufficient in striking down a statute of the State of New Jersey making it a crime to confederate in "gangs," saying,

> "If on its face the challenged provision is repugnant to the due process clause, specifications of details of the offense intended to be charged would not serve to validate it. (Cases cited.) It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."
>
> *Lanzetta v. New Jersey,* 306 U. S. 451, 453;
>
> *Stromberg v. California,* 283 U. S. 359.

In considering the history of this statute, it is well to recognize that in part, it was enacted to remedy a constitutional defect which had been pointed out by the United States Supreme Court. Paragraph (2), however, was not part of the original statute, and was not adopted to cure any defect. It is under this paragraph (2) that the indictment here under attack was framed. It may be profitable to consider the original act, and its constitutional failings, for a comparison of these two statutes shows that, if anything, the former, unconstitutional statute was less vague and more certain than its successor. Former section 8, of the Immigration Act of 1917, read as follows:

> "That any person . . . who shall bring into or land in the United States . . . (or shall attempt to do so) or shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place . . . any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter or to reside within the

United States under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000.00 and by imprisonment for a term not exceeding five years, for each and every alien so landed or brought in or attempted to be landed or brought in."

One Evans was indicted for concealing and harboring five aliens, and moved to dismiss the indictment on the ground that it did not charge a punishable offense. The indictment was dismissed and the Supreme Court affirmed the dismissal, saying, in part:

"(. . . But . . .) strong as the presumption of validity may be, there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial functions."

United States v. Evans, 333 U. S. 483, 486.

"With both of the parties we agree that Congress ment to make criminal and to punish acts of concealing or harboring. But we do not know, we can only guess with too large a degree of uncertainty, which one of the several possible constructions Congress thought to apply."

United States v. Evans, 333 U. S. 483, 495.

II.

The Defect of Uncertainty Cannot Be Cured by Placing Words of Limitation or Explanation in the Indictment.

The indictment shows that the United States had grave doubts as to the constitutionality of this statute. In an effort to avoid the patent ambiguity, the indictment was not drawn in the words of the statute. The words, "an alien" were substituted for "he" as it appears in the statute, and the words, "said alien's entry" for "his last entry' as it appears in the statute.

Since paragraph (2) is not an independent sentence, it must be read together with paragraphs (3) and (4). Following the amendments proposed by the Government, we have grammatical chaos.

More important, however, this proposed amendment by the Government runs contrary to the rules governing penal statutes. A person must be able to look to the statute to determine its meaning, not to an indictment which might be more artfully drawn subsequent to the law's violation.

> "It is axiomatic, of course, that a criminal statute must give a clear and unmistakable warning as to the acts which will subject one to criminal punishment. And courts are without power to supply that which Congress has left vague."
>
> *Screws v. United States,* 325 U. S. 91, 136.

See also:

United States v. Petrillo, 332 U. S. 1, 6;

Dennis v. United States, 341 U. S. 494, 515.

III.

The Statute Constitutes Arbitrary, Capricious Class Legislation.

(a) Preliminary Discussion.

The Fifth Amendment does not prohibit governmental regulation for the public welfare. It merely conditions the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

Nebbia v. New York, 291 U. S. 502.

The function of the court in the application of the Fifth Amendment is to determine in each case whether circumstances vindicate the challenged regulation as an authority or condemn it as arbitrary or discriminatory.

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522.

See also:

Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381;

Mulford v. Smith, 307 U. S. 38;

Yick Wo v. Hopkins, 118 U. S. 356;

Wong Wing v. United States, 163 U. S. 228;

United States v. Wong Kim Ark, 169 U. S. 649.

(b) The Provision of Paragraph (2) Relating to the Transportation of One Whose Last Entry Into the United States Occurred Less Than Three Years Prior Thereto Is Arbitrary and Capricious.

Appellant recognizes that the legislature may recognize degrees of evil and adopt its legislation accordingly.

Consolidated Coal Co. v. Illinois, 185 U. S. 203, 207;

McLean v. Arkansas, 211 U. S. 539, 551;

Miller v. Wilson, 236 U. S. 373, 384.

Under this doctrine, therefore, the legislature may properly place limitations of time in which an action may be commenced or a criminal prosecution started. At first blush, the language complained of herein might be construed to be of that class.

A closer examination, however, reveals that the language does not apply to the time of commencing a criminal action. This Act places no limitation upon the time in which proceedings may be commenced to deport an alien illegally in the United States. Whether he be in this country three days, three years, or thirty years, such an alien is always subject to deportation, and to criminal prosecution for his unlawful entry. There is no reasonable relation between the establishment of an arbitrary three-year period of illegal residence, and any object sought to be attained by the act.

This provision is deceptive because it deals in periods of time, and we have become accustomed to conceding the

power of the legislature to prescribe limits of time. However, there would be no doubt as to the arbitrary nature of this classification if instead of period of illegal residence the classification related to the race, sex or color of the alien. The clear purpose of Congress was to prevent the unlawful admission into the United States of *all* aliens, not just certain groups.

Assume a fact situation in which two men owned trucks which they parked alongside the fence at Calexico. As illegal aliens approached, they would be questioned by the truck drivers, "How long have you been in the United States since your last illegal entry?" Those who answered, "more than three years," would be directed to one truck, and those less than three years to a second truck. Then, when both trucks are loaded with a cargo of "alambristas," they leave for the farms of the Sacramento Valley. All of the passengers of both trucks are illegal aliens subject to immediate deportation, yet the driver of the first truck would be innocent of any wrong, and the driver of the second truck subject to imprisonment for five years for each such passenger in his truck. Such a law does not operate alike upon all persons under the same circumstances and conditions, but discriminates against some and favors others. Such a law falls afoul of the Fifth Amendment.

Barbier v. Connolly, 113 U. S. 27, 32.

(c) So Much of Paragraph (4) Which Exempts From the Operation of the Statute Persons Employing Aliens Illegally in the United States Establishes an Unconstitutional Preferred Class.

As Appellant has heretofore noted, paragraphs (2) (3) and (4) must be read together, since no one paragraph constitutes an independent sentence. Paragraph (4) provides in part as follows:

> ". . . *Provided, however,* that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

It is difficult to separate "harboring" from "transporting" for the latter would appear to include the former. Webster's Collegiate Dictionary (fifth edition) defines the verb, "harbor" as meaning "to entertain as a guest; to shelter; to give a refuge to; to lodge, or abide for a time."

Bouvier's Law Dictionary defines "to harbor" as meaning "to receive clandestinely or without lawful authority a person for the purpose of so concealng him that another having right to the lawful custody of such person shall be deprived of the same."

By reason of the interconnection of these two words, it is apparent that the exception set forth above establishes a special class immune from prosecution for the very acts committed by Appellant.

It is recognized that one of the incidents of employment may be transportation, which in turn might constitute harboring. If an alien is hired as he scrambles over the fence at San Ysidro and immediately whisked by truck to the lettuce fields of Salinas, such harboring and transportation would be part of the usual and normal practices incident to employment. Where one is employed to perform services elsewhere, he is within the course of his employment from the time and place of his hire.

Magnolia Petroleum Co. v. Hunt, 320 U. S. 430;
Pacific Emp. Ins. Co. v. I. A. C., 306 U. S. 493.

It is a fact of common knowledge, of which this Court may take judicial notice (*United States v. Aluminum Corp. of America*, 1 F. R. D. 71) that the influx of aliens from the Mexican border has reached the flood stage. The Court may also take judicial notice that almost inevitably these aliens are unskilled farm labor, and that the overwhelming majority of them are employed in the fields and on the farms of California.

If it is the Congressional intent to dam this flood of illegal immigration, it is certainly the ultimate in unreasonable discrimination to give an arbitrary benediction to the arch villain who provokes, aids and abets the unlawful entry of the thousands of "wetbacks" and "alambristas" into the United States, and place a heavy hand upon the shoulder of the poverty-stricken sharecropper who gives three or four of these aliens an automobile ride to their destination.

> "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' Yick Wo v. Hopkins, 118 U. S. 356, 369, 6 S. Ct. 1064, 1070, 30 L. Ed. 220. When the law lays an unequal bond on those who have committed intrinsically the same

quality of offense and sterilizes one and not the other, it has made as an insidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

Skinner v. Oklahoma, 316 U. S. 535.

Here, the harsh sanctions of the law are imposed upon Trilby, while Svengali goes free.

Conclusion.

Appellant respectfully submits that the statute has at least three possible meanings. One of those meanings would require that both the transporter and the person transported be in the United States illegally. The Agreed Statement of Facts sets forth that both Appellant and his wife entered the United States legally. [Clk. Tr. p. 9.] If this interpretation of the statute be followed, there is insufficient evidence to show the commission of the crime.

On the other hand, if one or more of the other possible interpretations be relied upon, then the existence of such possible different interpretations in itself shows that the Act is void for vagueness.

Finally, even if it not be void for vagueness, it establishes at least two classifications of persons and offenses, both of which classifications bear unequally on persons of the same class.

The judgment should be reversed, and the indictment dismissed.

Respectfully submitted,

LIONEL RICHMAN,

Attorney for Appellant.

EXHIBIT A.

United States Court of Appeals for the Ninth Circuit.

Faustino Herrera, Appellant, vs. United States of America, Appellee. No. 13,733.

Nov. 19, 1953.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Stephens, Healy, and Pope, Circuit Judges.

Healy, Circuit Judge.

Appellant was convicted on three counts of an indictment charging him with the transportation within the United States of aliens, knowing that they were in the United States in violation of law and having reasonable grounds to believe that their entry occurred less than three years prior to the transportation.[1]

The aliens in question were Mexicans who had clandestinely crossed the border into Southern California. The indictment was predicated on Section 8 of the Immigration Act of 1917, as amended by Public Law No. 283, approved March 20, 1952, 66 Stat. p. 26, 8 U. S. C. A. §144(a)(2). The facts are stipulated, and the conviction is assailed only on grounds having to do with the validity of the statute. The contentions are, first, that the statute is void for vagueness, and second, that it constitutes an arbitrary and capricious form of class legislation.

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[1]The transportation alleged and admittedly occurring was from Coachella Valley in Southern California to Sacramento in that state.

Public Law 283 is entitled "An Act to assist in preventing aliens from entering or remaining in the United States illegally." House Report No. 1377, 82nd Cong., 2nd Sess., indicates that the purpose of the legislation was to "overcome a deficiency in the present law making it an offense to harbor or conceal aliens who have entered this Country illegally, *and to strengthen the law generally in preventing aliens from entering or remaining in the United States illegally.*" [Emphasis supplied.] The legislation appears to have been an outgrowth of the decision in United States v. Evans, 333 U. S. 483, in which it was held that the existing statute contained no penalty provision for a person convicted of harboring or concealing an alien illegally in the United States. The amended §8(a) is copied on the margin.[2]

The claim of vagueness and uncertainty is bottomed on the employment in paragraph numbered (2) of §8(a)—under which the indictment was drawn—of the pronouns "he" and "his." It is said that this paragraph is suscepti-

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[2]"An Act to assist in preventing aliens from entering or remaining in the United States illegally.

. . . .

"Sec. 8(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

"(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

"(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

"(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection,

ble of two radically different interpretations, depending upon whether the pronouns "he" and "his" refer back to the phrase "any person" as used at the beginning of subdivision (a), or forward to the phrase "any alien," found in paragraph (4). The argument proceeds on a holding in United States v. De Cadena, 105 F. Supp. 202, 207, to the effect that the legislation is in this respect unconstitutional for vagueness.

While the verbal arrangement of the statute may be thought awkward, we are of opinion that a reading of it as a whole in light of the congressional declaration of purpose leaves no rational doubt as to what was intended. That part of subsection 8(a), ending with the word "who," specifies the persons whose activities are the subject matter of the legislation. Paragraph (1) following relates to the activity of smuggling aliens into the United States; paragraph (2) to the transportation of aliens within the United States by one who knows they are unlawfully here and who knows or has reason to believe that the alien's last entry occurred within three years prior to the transportation; paragraph (3) to the conceal-

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in any place, including any building or any means or transportation; or

"(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of any alien, including an alien seaman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigation or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

"(b) . . .

"Sec. 2. . . ."

ing, harboring or shielding of aliens unlawfully in the United States; and the first part of paragraph (4) is aimed at those who aid, abet or encourage the smuggling of aliens into this Country. Except for the proviso at the end of paragraph (4), the whole of the subsection constitutes a single sentence, divided into paragraphs which are in the interest of clarity separated from each other by semicolons. The penalty provision is not separately stated in the paragraphs but is set forth in the last. The several types of conduct banned are all made subject to the same punishment there specified, namely, fine or imprisonment "for each alien in respect to whom any violation of this subsection occurs." The words "this subsection" can only refer to subsection (a). Thus it is manifest that the "he" and "his" of paragraph (2) refer to the phrase "any alien," which finally shows up in paragraph (4) after the several prohibited activities in respect of the alien have been specified.

The argument that the statute is arbitrary and capricious to the point of invalidity is made on two grounds, but one of which merits attention. This is that the proviso of paragraph (4), for convenience again quoted on the margin,[3] "establishes an unconstitutional preferred class," namely *employers* of aliens known to be unlawfully in the United States. The proviso relates only to

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[3]"Provided, however, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

"harboring," which is a practice condemned in paragraph (3) of the law. Harboring is thus treated in the statute as an offense separate and distinct from that of transportation, which latter is the concern of paragraph (2).[4] Assuming, without consideration of the point, that the classification is unreasonable, we are unable to see how appellant is in position to take advantage of the circumstance. He was charged, not with harboring, but with transporting. It is a familiar rule that a party can be heard to question a statute's validity only when and in so far as it is being applied to his disadvantage. Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282. *Cf.*, also, Berea College v. Kentucky, 211 U. S. 45. Whether, in view of the problems with which Congress was confronted in the enactment of this legislation, the proviso of paragraph (4) is a reasonable one is a matter best left to be considered when decision of it becomes essential. If believed necessary to the preservation of the statute the courts would in all likelihood give only narrow scope to the proviso.

The judgment is affirmed.

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[4]The verb "harbor" is defined by Webster (New Int. Dict., 2nd Ed., Unabridged) as: "To afford lodging to; to entertain as a guest; to shelter; to receive; to give a refuge to; to contain; to indulge or cherish (a thought or feeling);—now usually with reference to evil, esp. unlawful, act or intent."

The verb "transport" is defined by the same authority as: "To convey; esp., to carry or convey from one place or station to another, as by boat or rail; to transfer; as, to transport goods or troops."

POPE, Circuit Judge.

I concur. If this were a state law I would have some doubts about a classification which punishes the man who gives a couple of "wetbacks" a ride, and yet entirely excuses those whose employment of such aliens is primarily responsible for the whole Mexican alien problem. But the Fifth Amendment contains no equal protection clause, Detroit Bank v. United States, 317 U. S. 329, 337, and the discrimination here cannot be said to be so arbitrary and injurious in character as to make the statute wanting in due process.

(Endorsed:) Opinion and Concurring Opinion. Filed Nov. 19, 1953. Paul P. O'Brien, Clerk.

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Report of President's Commission on Migratory Labor, 1951, p. 88	6

290165—54

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 503

FAUSTINO HERRERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 8–12) is reported at 208 F. 2d 215.

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1953 (R. 12–13). The petition for a writ of certiorari was filed on December 19, 1953. The jurisdiction of this Court invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether Section 8 (a) 2 of the Immigration Act of 1917, as amended by the Act of March 20, 1952, Public Law 283, 66 Stat. 26, punishing the

transportation of illegally entered aliens, is void for vagueness.

2. Whether Section 8 (a) 2 of the statute set an arbitrary and capricious standard in that it punished the transportation of only those aliens whose illegal entry was known by the transporter to have occurred within the preceding three years.

3. Whether the section under which petitioner was convicted was void as establishing an unconstitutional preferred class in that another subsection provided that employment of illegally entered aliens should not be deemed to constitute harboring of such aliens.

STATUTE INVOLVED

The challenged statute as amended March 20, 1952, 66 Stat. 26, read, in pertinent part, as follows:

> Sec. 8 (a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;
>
> (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to trans-

port or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of any alien, including an alien seaman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this Act or any other law relating to the immigration or expulsion of aliens,

shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

STATEMENT

In the United States District Court for the Southern District of California, petitioner was convicted on three counts charging that in November 1952, he transported three illegally entered Mexican aliens, knowing that they were

in the United States in violation of law and having reasonable grounds to believe that their last entry had occurred less than three years previously (R. 1–2, 3). He was sentenced to three years' imprisonment on each of two counts, the sentences to run concurrently, and was fined ten dollars on each of these counts. He was placed on probation under the third count (R. 3–4). The conviction was affirmed on appeal (R. 12–13).

The sole question raised on appeal and in the petition for certiorari is the constitutionality of the statute. Petitioner contends that the subsection under which he was convicted is too vague to establish an ascertainable standard of guilt, and that it sets an arbitrary and capricious standard unrelated to the object of the act, operating unequally upon persons in the same circumstances. He claims also that the exemption of employment from the definition of harboring elsewhere in the statute, sets up an unconstitutional preferred class.

ARGUMENT

1. Relying on a holding in *United States* v. *De Cadena,* 105 F. Supp. 202 (N. D. Calif.), petitioner argues that the statute is vague in that the pronouns "he" and "his" in the introductory clause of paragraph 2, i. e. "knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States" can be interpreted to refer to either the transporter of the

aliens or the alien who is transported. While it may be conceded that the construction of the statute is awkward, its meaning is clear. The subject is "any person" and the activities regulated are described by modifying "who" clauses separately set out in the four subsections. The transitive verbs in each subsection describing these activities have as their object "any alien", which appears in the fourth subsection. Properly punctuated, the object "any alien" would be placed at the beginning of a new line, with a dash after the preceding "of".[1] Punctuation may, however, be supplied, *United States* v. *Shreveport Grain & L. Co.*, 287 U. S. 77, in criminal as well as civil statutes, *United States* v. *Lacher*, 134 U. S. 624.

As to subsection (2), the knowledge must be that of the transporter, and the person who must have entered the country illegally within three years must be the alien. The clauses establish scienter, thus protecting persons who might transport unaware of the status of the aliens. Thus "he" and "his" must refer to "alien", the object of the sentence, rather than to the subject "any person." The results of any other construction would be absurd. Obviously Congress would not have felt it necessary to require that the transporter "have reasonable grounds to believe" that he himself had made an illegal entry within three

[1] Such punctuation was supplied in the reenactment of the statute as Section 274 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 228–229.

years. And obviously Congress did not intend to limit the application of the statute only to those who had themselves entered illegally.

The legislative history confirms the obvious statutory purpose. The Act resulted directly from a recommendation by the President's Commission on Migratory Labor contained at page 88 of its Report issued in 1951 that "The Immigration and Naturalization Service be strengthened by * * * (b) clear statutory penalties for harboring, concealing or transporting illegal aliens, * * *." On the basis of this recommendation the President, in his message dated July 13, 1951 (House Document 192, 82nd Cong., 1st Sess.), with respect to S. 984 which became P. L. 78, Act of July 12, 1951, 65 Stat. 119 (allowing recruiting by the Secretary of Labor of Mexicans five years in the United States), suggested that "* * * the existing provisions of law punishing transportation of illegal immigrants must be strengthened * * *." On the same day that the President's message was received, there was introduced S. 1851 which became P. L. 283.[2] House Report No. 1377 on the bill, 82nd Cong., 2nd Sess., stated (p. 2):

[2] The Immigration and Nationality Act of 1952, passed June 27, 1952, effective as of December 24, 1952, was already near final preparation at the time of the passage of P. L. 283. Congress could not wait for the comprehensive Act, however, because Mexico had stipulated with us for passage of an Act combatting the illegal immigration of her nationals in exchange for Mexico's permission for contracting her agricultural laborers for work in the United States. 98 Cong. Rec. 795, 796, 1346.

> Paragraph (2) of the same subdivision, punishing the transporters of illegally entering aliens would require knowledge that the transported alien was in the United States in violation of law and would also require proof or reasonable grounds for belief that the transported alien had entered the United States within the preceding 3 years.

Thus, the legislative history of P. L. 283 is conclusively against petitioner's strained construction.[3]

2. Petitioner contends that the Act is arbitrary and unreasonable in its provision limiting the offense to the transporting of those aliens who to the transporter's knowledge entered the country within the preceding three years. His claim is that there is no reasonable relation between the establishment of an arbitrary three-year period of illegal residence and any object sought to be obtained by the Act. He claims also that the law

[3] The Act was also designated to correct the defect in former Section 8 of the Immigration Act of 1917, 8 U. S. C. (1946 ed.) 144, found by this Court in *United States* v. *Evans*, 333 U. S. 483, in that that statute condemned harboring of illegally entered aliens but failed to provide a penalty. Petitioner quotes general language from the *Evans* decision to urge that it be found applicable to his situation. But it is abundantly clear from the *Evans* opinion that the Court struck down the statute because it would not write a criminal penalty into a statute when the legislature had omitted it, in accord with sound judicial tradition against supplying a *casus omissus*. Here the question is merely one of interpreting the language used, at most supplying punctuation.

does not operate alike upon all persons under the same circumstances and conditions.

As to the latter contention, the first answer is that the provision does operate alike on all persons similarly circumstanced in that the same penalty applies to all who knowingly transport aliens who have illegally entered within the preceding three years. Secondly, the equal protection clause is not applicable to the Fifth Amendment, *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381; *Currin* v. *Wallace,* 306 U. S. 1, and the provision is not so arbitrary as to violate due process.

Congress could reasonably feel that illegal entrants who had lived in this country for some time were in a different position from those who had illegally entered more recently. In authorizing agreements between the United States and Mexico respecting farm labor, 65 Stat. 119, Congress specifically authorized recruitment of illegally entered Mexicans who had been in the country five years.[4] Considering the broad power

[4] House Conference Report No. 668, 82nd Cong., 1st Sess., 97 Cong. Rec. 7538, 7539, on P. L. 78, with reference to its five-year provision states:

"This will prevent the hiring of so-called "wetbacks" under the contracts authorized by this bill but will permit those Mexicans who actually have lived for many years in the United States, even though their entry might not have conformed to legal requirements, to obtain agricultural work. The committee of conference believes that this provision is necessary in essential justice to the many Mexicans who, because of the closeness of Mexico and the United States and

of the legislature with respect to classification generally, *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, and the plenary power of Congress with respect to aliens, *Harisiades* v. *Shaughnessy,* 342 U. S. 580, the classification here made cannot be said to be unreasonable.

3. There is no merit in the contention that the section under which petitioner was convicted is void because the proviso which excludes employment from the definition of harboring establishes an unconstitutional preferred class. Since petitioner was not charged with harboring, the alleged discrimination would not be applicable to his case. *American Power and Light Co.* v. *Securities Exchange Commission,* 329 U. S. 90, 107; *First National Bank of Shreveport* v. *Lousiana Tax Commission,* 289 U. S. 60.

Moreover, the alleged discrimination cannot be called so arbitrary as to violate due process. The debate on the statute (98 Cong. Rec. 794, 797, 1348) points to a Congressional policy of providing punishment for employers who deliberately aid illegal entrance of Mexicans while avoiding imposition of penalties on farmers who might innocently hire wetbacks.

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the traditional freedom of movement across the border, may have entered the United States without complying with immigration formalities, but who have been for many years continuous and useful residents in the United States. It should be remembered that though such Mexicans may meet the requirements of this provision and be acceptable to their American employers, they still cannot be contracted without the consent of the Mexican government."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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